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IN THE

# Supreme Court of the United States

MAREI VON SAHER,

*Petitioner,*

*v.*

NORTON SIMON MUSEUM OF ART AT PASADENA and NORTON SIMON ART FOUNDATION,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF

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Petitioner, Marei von Saher, respectfully submits this Reply Brief to address new points raised in the Opposition Brief of Respondents, the Norton Simon Museum of Arts at Pasadena and the Norton Simon Art Foundation.

## RESPONSES TO RESPONDENTS' BRIEF

### I. Bases for Granting the Petition

Respondents devote much of their brief to setting up straw men to knock down. They suggest that Petitioner has failed to show a conflict between the Circuit Courts of Appeal or the lower courts, or that the Ninth Circuit ruling in this case conflicts with a decision of a state court of last resort. Petitioner, however, did not rely on any of those grounds. Rather, certiorari is warranted pursuant to Rule 10(c) of the Rules of the Supreme Court because the Ninth Circuit decided an important federal question in a way that conflicts with the Court's decision in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). "Certiorari is often granted and the matter clarified where the court of appeals has allegedly misconstrued, misapplied, or misconceived an applicable Supreme Court opinion." Eugene Gressman, et al., *Supreme Court Practice* 252 (9th ed. 2007).

Respondents then falsely state that Petitioner argued that the Ninth Circuit erred in its application of *Garamendi* "because it 'misconstru[ed]' the 'legislative history of the California statute.'" Resp. 1. In fact, Petitioner argued that the Ninth Circuit not only misconstrued, misapplied or misconceived *Garamendi*,

but also misconstrued the legislative history of §354.3 in order to justify its erroneous conclusion that California acted outside of its traditional competence. Pet. 14-16.

Petitioner also raised as a basis for certiorari the Ninth Circuit's expansion of foreign affairs field preemption in a case where the only possible effect on foreign affairs is incidental, thus extending, without authority, the field preemption doctrine set forth in *Zschernig v. Miller*, 389 U.S. 429 (1968), and later, in *Garamendi*. Section 354.3, far from aggrandizing a state's role in foreign affairs (Resp. 26), does not address a matter of foreign relations, but rather, only a core state function, the statute of limitations. *See Garamendi*, 539 U.S. at 419 n.11 ("field preemption might be the appropriate doctrine" if the state were to act "on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility").

Respondents argue that this is not the appropriate case in which to elucidate *Zschernig* and the doctrine of foreign affairs field preemption because the Ninth Circuit's erroneous opinion has "little, if any" relevance beyond this case. Resp. 13. This is simply untrue. Ambassador Stuart Eizenstat's recent testimony before the Commission on Security and Cooperation in Europe (the U.S. Helsinki Commission) regarding the results of the June 2009 Prague Conference on Holocaust Era Assets reiterated the policy of the Federal Government as confirmed by its adoption of the Terezin Declaration: "The Terezin Declaration . . . urges that courts and other fora that decide art restitution cases base their decisions on the facts of the individual case rather than relying on technical legal grounds such as statutes of

limitations . . . ." *Holocaust Era Assets — After the Prague Conference, before the Commission on Security and Cooperation in Europe* (May 25, 2010) (Statement of Stuart E. Eizenstat, former U.S. Ambassador to the European Union) ("Eizenstat Testimony"). Plainly, the Ninth Circuit's decision has a great deal of relevance, not only to California and Petitioner, but also to the Federal Government, which pledged its support of the Terezin Declaration. Moreover, one of Petitioner's amici, the Commission for Art Recovery, made clear that, but for the *Von Saher* decision, it would be undertaking a nation-wide initiative to extend statutes of limitations for Holocaust-era claims.

It is also disingenuous for Respondents to argue (Resp. 32) that the Terezin Declaration and the Washington Principles do not support Petitioner's statement that U.S. policy includes having Holocaust art restitution claims resolved in the courts. Not only do Respondents ignore the statements of Ambassador J. Christian Kennedy (Pet. 23), but they fail to address Ambassador Eizenstat's recent testimony, which made clear that, not only is the U.S. policy to have Holocaust restitution cases decided based on their merits, rather than on technical defenses, but to encourage alternatives to litigation, particularly where the objects in question are of lower monetary value. With respect to alternative fora versus litigation, Ambassador Eizenstat testified:

> Such a forum would be particularly well-suited to deal with claims for works of lesser value. This is because most experts believe that claims for high value artworks will inevitability

> go to the court system, since the value of the artwork would justify the expense of a judicial proceeding. . . .

Eizenstat Testimony. Plainly, the Federal Government expects that Holocaust art restitution cases will be heard in U.S. courts and that technical defenses should not be a bar to those cases; exactly what §354.3 is designed to enable.

It is ironic that Respondents cite *In re Assicurazioni Generali, S.p.A.*, 592 F.3d 113 (2d Cir. 2010) as an example of a case where *Garamendi's* preemption analysis was applied. In *Generali*, the Second Circuit Court of Appeals twice sought and received direction from the State Department as to the Federal Government's position and policy before finding that the plaintiffs' claims were preempted by the same presidential policies identified in *Garamendi*. The Ninth Circuit made no effort to ascertain the Federal Government's policy with respect to statutes of limitation for Holocaust art cases, or whether the Federal Government perceived any effect on foreign affairs from §354.3. While we believe the recent pronouncements by the Federal Government leave no doubt as to its policy on Holocaust restitution claims and the statute of limitations, we submit that if the Court needs any clarification as to the policy, it would be appropriate to ask the Federal Government to clarify its position.

## II. The Uniqueness of §354.3

Respondents argue that the courts should reflexively hold that §354.3 is unconstitutional merely because certain other statutes passed by the California legislature, which address other claims of victims of the Holocaust or the Armenian Genocide, were held unconstitutional. But these statutes were fundamentally different from §354.3. They addressed very different kinds of claims and actually conflicted with current, identifiable federal policies. Section 354.3 does not; it is perfectly consistent with U.S. policy.

For example, Cal. Code Civ. Proc. §354.6 created a cause of action for victims of WWII slave labor to bring a claim for compensation against any entity, or successor thereto, for whom that labor was performed. That statute differs from §354.3 on many levels. First, §354.6 targets solely the Axis war machine and successor companies that trace their very existence to it. Section 354.3, on the other hand, targets museums and galleries solely because they are in possession of looted art and not because of ties to the Axis war effort. Second, §354.6 seeks compensation for war crimes from those who committed them, whereas §354.3 only extends the statute of limitations for claims for stolen property, irrespective of any relationship to war criminals. Third, unlike §354.6, §354.3 does not create a new cause of action, but merely extends a statute of limitations, as all of the legislative summaries and descriptions of §354.6 demonstrate. Appellees' Supplemental Excerpts of Record in CA9 ("SER") 0155-0162. For example, the description of §354.6 describes it as a bill to

> provide that any slave or forced labor victim of the Second World War, or heir of the victim, may

> bring an action to recover compensation for labor performed without pay between 1929 and 1945 against any person or entity who received the benefit of that labor. It also would extend the statute of limitations for these actions until December 31, 2010.

SER 0155. The same is not true of §354.3. As every one of the summaries and descriptions of California Assembly Bill 1758 (which eventually became §354.3) makes clear, all the legislation does is extend the statute of limitations for suits brought to recover Holocaust era artwork. Appellant's Excerpts of Record in CA9 ("ER") 101, 107, 111, 132. The subject of §354.3 is always set forth as "limitations of actions" and its description given as a bill to "revive and extend the statute of limitations." ER 101, 111. Section 354.3 has no, and was intended to have no, substantive component. It is purely a new statute of limitations designed for a particular type of case. Thus, despite Respondents' false assertion (Resp. 6), Petitioner never brought a "§354.3 action," as there is no such thing. As the complaint in this case makes clear, Petitioner brought claims for replevin, conversion, damages under the California Penal Code, to quiet title and for declaratory relief. ER 276.

Finally, the fact that the Court denied certiorari in connection with the Ninth Circuit's decision in *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003), the case holding California's WWII slave labor statute unconstitutional, is hardly surprising in light of *Garamendi*. The slave labor statute actually conflicted with the same Foundation Agreement policy that preempted the HVIRA in *Garamendi* (Pet. 12-13), as

well as the 1951 San Francisco Peace Treaty with Japan. *Taiheiyo Cement Corp. v. Superior Court*, 117 Cal. App. 4th 380, 390 (Cal. App. 2004). It was, therefore, obvious from *Garamendi* that the statute in *Deutsch* was preempted on the basis of actual conflict, and there was no need to address the issue of field preemption.

**III. There is No Actual Conflict**

Apparently aware of the precarious nature of the Ninth Circuit's reliance on foreign affairs field preemption in this case, Respondents argue that certiorari should not be granted because, they say, the case should be independently barred under conflict preemption principles, despite the Ninth Circuit's holding to the contrary. Resp. 2. In support, Respondents resurrect their contention, rejected by the Ninth Circuit, that §354.3 is in direct conflict with the post-WWII external restitution policy.

Putting aside the fact that Respondents did not file a cross-petition in connection with the Ninth Circuit's ruling with respect to the inapplicability of external restitution or seek rehearing on this point (despite having sought rehearing on other issues), and the utter lack of any actual conflict, it is plain that the obsolete external restitution policy, which was never intended to be anything more than a temporary solution to a purely logistical problem, has no relevance here.

> "External restitution," as it was known, refers to the *process* whereby U.S. authorities returned certain categories of assets—cultural property, securities, machinery, heavy

> agricultural and industrial equipment, locomotives, rolling stock, barges, transportation equipment, and communication and power equipment — found in Germany or Austria to the governments of the countries from which they were stolen. Assets were restituted once the country of origin could be identified, and missions sent by other governments helped to identify assets that were subject to restitution. In cases where assets were restituted in this manner, the *recipient government bore the responsibility to locate the rightful owner and to restitute the property turned over to it by U.S. authorities.* The commission has found no evidence that the United States monitored the recipient countries' compliance with these responsibilities.

*Plunder and Restitution: The U.S. and Holocaust Victims Assets: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report* 8 (2000) (emphasis added). A critical component of external restitution was that property was sent to the country of origin, which then *had the responsibility to restitute it to the rightful owner.*

Nothing about the external restitution policy suggests that the rightful owner of an artwork is precluded from bringing an action to recover her artwork merely because it was externally restituted. Indeed, the failure of countries of origin to return items to their rightful owners subsequent to external restitution is one of the situations that the Washington

Principles was intended to cover. *See* Stuart E. Eizenstat, *Imperfect Justice* 188-189 (2003).

Our courts have rejected the argument that the country of origin's post-War restitution laws could be viewed as the exclusive means of restoring property. This was made clear by former Chief Judge (later Attorney General) Michael B. Mukasey in *U.S. v. Portrait of Wally*, No. 99 Civ. 9940, 2002 WL 553532, at *8 (S.D.N.Y. Apr. 12, 2002) ("That Austria, pursuant to Treaty, sought to return all improperly seized property or to otherwise use it for the victims' general benefit does not deprive this court of jurisdiction over property that escaped such disposition."). *See also Republic of Austria v. Altmann*, 541 U.S. 677 (2004). So too, our courts can adjudicate cases dealing with property that escaped restitution to the original owners following its return to the Netherlands by U.S. troops.

## IV. The Stroganoff Red-Herring

Through disingenuous wording and an incorrect recital of the allegations in Petitioner's complaint, Respondents imply that this case is ultimately about choosing between the heirs of two families who both previously lost the Cranachs through looting and who both sought restitution. Besides being irrelevant to the issue decided by the Ninth Circuit as to which certiorari is sought, this is entirely false. Respondents first state that "the Soviet Union seized the Cranachs from a church in the 1920s," citing paragraph 11 of the complaint (Resp. 11), suggesting an unstated parallel with the Nazi practice of looting artworks. Nowhere, however, does the complaint allege that the Cranachs were "seized"

by the Soviet Union. It states only that the Cranachs were transferred from the church to state-owned museums. ER 279. The Soviet nationalization of property, such as the Cranachs, has long been recognized as valid by U.S. courts. *See Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 22 (S.D.N.Y. 1976). Respondents completely fail to mention that the complaint goes on to allege that the Soviet Government made arrangements to sell *state-owned artworks* abroad and that these works, which included the Cranachs, came from various state-owned museums as well as the Stroganoff Collection. ER 279. Building on that omission, Respondents then cite paragraph 13 of the complaint to state that the Cranachs were sold in Germany in 1931 "in an auction that was titled simply 'the Stroganoff Collection'" and that Jacques purchased them there, but omit the most critical sentence from that paragraph: "Some of the artworks, like the Cranachs, were not at that time, and had never been, part of the Stroganoff Collection." ER 279.

This is actually underscored by Respondents' own citation to *Stroganoff-Scherbatoff*, 420 F. Supp. at 20. Resp. 7. The claimant in that case, who was seeking recovery of artworks he alleged were part of the Stroganoff Collection, was the same individual from whom Respondents acquired the Cranachs. Respondents presumably include the citation because the 1931 auction of the Stroganoff Collection is mentioned. The very page of that decision to which Respondents cite, however, shows that the issues in that case precisely parallel Petitioner's allegations about the source of the Cranachs: "Defendant Weldon contends that the auction catalogue does not support plaintiff's

contentions that the . . . [claimed artwork] was part of the Stroganoff Collection. Rather, Weldon contends that . . . [it] was part of the collection of the Imperial Hermitage Museum in St. Petersburg, Russia." *Id.* The court ultimately ruled against Stroganoff-Scherbatoff, and courts in other countries had rejected similar claims by Russian émigrés even before the 1931 auction took place. *Id.* at 21-22.

## V. Respondents' Misreading of the Ninth Circuit's Opinion

Respondents argue that the Ninth Circuit would have found that §354.3 did not address a traditional state interest, even if applied only to museums and galleries in California. Resp. 19. But this contention is belied by the plain language of the opinion. The Ninth Circuit stated that California has a legitimate state interest in regulating museums and galleries within its borders (App. 23a), but

> [b]y opening its doors as a forum to all Holocaust victims and their heirs to bring Holocaust claims in California against "any museum or gallery" whether located in the state or not, California has expressed its dissatisfaction with the federal government's resolution.... In so doing, California can make "no serious claim to be addressing a traditional state responsibility."

App. 24a. As Judge Pregerson explained in his dissent, it was the opening of the state's doors to claims against non-residents that the Ninth Circuit found eviscerated

California's traditional state interest. It is highly unlikely that Judge Pregerson misapprehended or misread the majority opinion.

## VI. "Attacks" Against Foreign Sovereigns

Finally, Respondents raise the argument that §354.3 will allow U.S. courts to collaterally attack restitution decisions made by foreign governments, noting that in the instant case it is alleged that the Dutch Government wrongfully sold the Cranachs to Stroganoff. Nevertheless, even if Petitioner only continues to prosecute her case under California's general statute of limitations, which the Ninth Circuit concluded is permissible (App. 35a), a court in California will still have to review the Dutch Government's treatment of the Cranachs. Thus, it was not §354.3 that requires or even allows the courts to review prior acts of a foreign government. It has long been U.S. policy that victims of Nazi forced transfers may bring lawsuits in U.S. Courts to recover their property. *See Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

## CONCLUSION

For all of the foregoing reasons, and as set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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